NO. 85570-6

SUPREME COURT
OF THE STATE OF WASHINGTON

PATRICK A. WILLIAMS and ANDREA HARRIS,
his wife, and ANDREA HARRIS as guardian for
ELENA-GENEVIEVE HARRIS, a minor child,
and JOSHUA HARRIS, a minor child,

Petitioners,

vs.

FESSEHA K. TILAYE and JANE DOE TILAYE,
his wife and the marital community composed thereof,
and MAMUYE A. AYELEKA d.b.a.
ORANGE CAB 485 and JANE DOE AYELEKA,
his wife and the marital community composed thereof,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER ANDREA HARRIS

Attorneys for Petitioner Andrea Harris:

Patrick Kang, WSBA #30726
Premier Law Group, PLLC
3380 146th Place, Suite 430
Bellevue, WA 98007
(206) 285-1743

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. ASSIGNMENTS OF ERROR

1. The Court of Appeals erred by concluding that the term "trial" as it appeared in RCW 4.84.280 included "mandatory arbitration," where a related statute, RCW 4.84.010(5) and (7), as well as the plain meaning rule clearly indicates that the Legislature did not intend to include "mandatory arbitration" in the term "trial" under RCW 4.84.280.

2. The holding in Singer v. Etherington, 57 Wn. App. 542, 789 P.2d 108 (1990), and the Court of Appeals' reliance on Singer, was error because the Singer court's decision that the mandatory arbitration is the "trial" and the trial de novo an "appeal" under RCW 4.84.290 renders portions of RCW 4.84.290 meaningless and superfluous.

3. The trial court and the Court of Appeals erred by failing to award Petitioner Harris a multiplier on her attorney's fees under the Lodestar, even though the trial court found that there was significant amount of contingent risk in Harris's counsel taking on Harris's personal injury case.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Legislature intend to include "mandatory arbitration" to the term "trial" in RCW 4.84.280 when it did not explicitly include the word "mandatory arbitration" in RCW 4.84.280, even though in a related statute, RCW 4.84.010(5) and (7), the Legislature explicitly

included both words in the same sentence to acknowledge a distinction between a "trial" and "mandatory arbitration"?

2. Did the appellate court in Singer v. Etherington, 57 Wn. App. 542, 789 P.2d 108 (1990), and the Court of Appeals in this case, incorrectly conclude that the mandatory arbitration was the "trial" and the trial de novo the "appeal" for purposes of applying RCW 4.84.280 and .290, if the conclusions would render portions of RCW 4.84.290 meaningless and superfluous?

3. Should Petitioner Harris have been awarded a multiplier on her attorney's fees under the Lodestar where the trial court found that there was significant amount of contingent risk in handling Harris's personal injury case?

III. STATEMENT OF THE CASE

A. Introduction

This case arises from a motor vehicle personal injury action where the trial court awarded Petitioner Andrea Harris ("Harris") reasonable attorneys' fees pursuant to RCW 4.84.260 and .280 as the prevailing party after judgment was entered in her favor. The trial court rejected Respondent Fesseha Tilaye's (hereinafter "Tilaye") contention that the term "trial" as used in RCW 4.84.280 was meant to include "mandatory arbitration." In addition to reasonable attorney's fees, Harris also

requested a multiplier on her attorney's fees under the Lodestar method. The trial court found that there was substantial amount of contingent risk in handling this low impact, disputed liability, and disputed damages personal injury case; nevertheless, the trial court denied Harris' request for a multiplier.

On appeal, the Court of Appeals reversed the trial court's award of attorney's fees to Harris, concluding that the term "trial" as used in RCW 4.84.280 was meant to include "mandatory arbitration." However, in a related statute, RCW 4.84.010(5) and (7), the Legislature recognized the distinction between "trial" and "mandatory arbitration" and added the term "mandatory arbitration" to a provision that previously only had the word "trial." The Court of Appeals also declined to award Harris a multiplier on her attorney's fees under the Lodestar based on its conclusion that Harris was not entitled to attorney's fees under RCW 4.84.280.

B. Facts

In the early morning of December 25, 2005, Harris was traveling to SeaTac airport. RP 245, 247. Her boyfriend at the time, Patrick Williams ("Williams"), was driving and Harris was in the seat behind him with her two children seated next to her. RP 241, 246. There was water on the roadway. CP 575. As the car travelled south on I-5 in the far right lane, Harris saw an orange taxi cab driven by Tilaye pass very quickly in

the far left lane. RP 249. As it passed, the cab swayed to the left, seeming to hit the concrete divider. *Id.* The cab then swayed back and forth across several lanes and collided with William's car. RP 249-50, 328-32. As a result, Harris was injured. RP 251, 258, 264-68.

C. Procedure

Williams and Harris filed a complaint for negligence against Tilaye, the driver of the cab that struck them on Christmas day, and Mamuye Ayeleka (hereinafter "Ayeleka"), the registered owner of the cab. CP 3-7. Williams and Harris were represented at the time by attorney Robert D. Kelley ("Kelley"). CP 28, 539.

The case was transferred to mandatory arbitration pursuant to the parties' stipulation and order. CP 24-26. The arbitrator held in favor of Tilaye and Ayeleka, stating that he was unable to find proximate cause. CP 31-32. After the arbitration, Kelley told Harris he was withdrawing from her case and declined to handle the trial de novo because of the substantial legal and financial risks of going to trial. CP 44, 539-40. Harris, as pro se, requested a trial de novo pursuant to MAR 7.1. CP 33-34. After twenty or more attorneys declined to represent her, Harris was eventually able to convince attorney Patrick J. Kang, her current counsel (hereinafter "Kang"), to take her case on a contingency basis. CP 476, 487-90, 540.

On August 14, 2008, several months prior to the trial, Harris made an offer of settlement pursuant to RCW 4.84.280 in the amount of $9,000.00. CP 493-94. Tilaye's insurer declined the settlement offer. CP 476.

The trial de novo began on May 4, 2009. CP 399. The case was tried to the bench with the Honorable Cheryl Carey presiding. CP 399. Ayeleka was voluntarily dismissed as a defendant at the very outset of the trial. RP 74-76, 407-08.

At the conclusion of trial, the trial court found in favor of Harris and against Tilaye. CP 800-01. The trial court awarded Harris $20,512.00 as damages. CP 437-39. As the prevailing party, Harris requested reasonable attorney's fees and costs pursuant to RCW 4.84.260 and .280. CP 457-73.

The pertinent language of RCW 4.84.260 states:

> The plaintiff ... shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff ... as set forth in RCW 4.84.280.

RCW 4.84.280 states:

> Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to **trial**. Offers of settlement shall not be served until thirty days after the completion of the

> service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purpose of determining attorneys' fees as set forth in RCW 4.84.250.

(Emphasis added).

Because Harris made an offer of settlement more than ten days before trial, and her recovery was more than the $9,000 settlement offer she made pursuant to RCW 4.84.280, Harris contended that she was the prevailing party, entitling her to reasonable attorney's fees and costs.

In response, Tilaye contended that the "mandatory arbitration" was the "trial" under RCW 4.84.280, and the "trial de novo" was an "appeal," and since Harris failed to make her offer of settlement before the mandatory arbitration, she failed to comply with RCW 4.84.280; thus, Tilaye claimed Harris was not entitled to recover reasonable attorneys' fees. CP 739-41. The trial court rejected Tilaye's contention and awarded Harris reasonable attorneys' fees of $49,847.50, and statutory costs of $1,372.68 for a total judgment of $71,732.18. CP 800-02.

Tilaye appealed, and Harris cross-appealed. The cross-appeal related to the trial court's decision not to award Harris a multiplier on her attorney fees, even though the trial court found that there was significant amount of contingent risk in Harris's counsel taking on a low impact soft

tissue personal injury case where Harris had previously lost at the arbitration, and liability and damages were in dispute.

On appeal, among other issues, Tilaye again asserted that the "mandatory arbitration" was the "trial" under RCW 4.84.280 and that the "trial de novo" was the "appeal" under RCW 4.84.290, and therefore, the trial court erred by awarding Harris reasonable attorneys' fees because Harris's offer of settlement was not made more than 10 days before the mandatory arbitration. The Court of Appeals agreed with Tilaye and reversed the trial court's award of attorneys' fees to Harris.

In reaching its decision, the Court of Appeals relied on Singer v. Etherington, 57 Wn. App. 542, 789 P.2d 108 (1990), concluding that the term "trial" as used in RCW 4.84.280 was meant to include mandatory arbitration proceedings under chapter 7.06 RCW.

> A mandatory arbitration proceeding under chapter 7.06 RCW "is treated as the original trial" when applying RCW 4.84.290. The trial de novo is the appeal that makes RCW 4.84.290 applicable. Singer, 57 Wn. App. at 546. It follows that the arbitration is the proceeding in which the plaintiff must invoke RCW 4.84.260 in order to be deemed a prevailing party. The plaintiff can do this only by making an offer of settlement in the manner prescribed by RCW 4.84.280 – that is, at least 10 days before the arbitration that constitutes the "trial."

Harris, Slip Opinion, at p. 4 (Quotation marks original).

Based on its decision, the Court of Appeals declined to consider

Harris's cross-appeal. Id. at 5.

Pursuant to RAP 12.4, Harris timely filed a Motion for Reconsideration, contending that the Court of Appeals' decision failed to give effect to the long line of Supreme Court precedents which require unambiguous statutes to be given their plain and ordinary meaning. Harris contended that a plain and ordinary meaning of "trial" as used in the Black's Law Dictionary means "[a] judicial examination ... before a court that has jurisdiction." To the contrary, a plain and ordinary meaning of the term "arbitration" as used in the Black's Law Dictionary means "a process of dispute resolution in which a neutral third party (arbitrator) renders a decision...."

Harris further contended that by concluding that "mandatory arbitration" under RCW 7.06 was a "trial" for purposes of applying RCW 4.84.280, the Court of Appeals "read into a statute matters that were not in it" and "created legislation under the guise of interpreting a statute;" both of which are explicitly prohibited by Supreme Court precedents. Nevertheless, the Court of Appeals denied Harris's motion for reconsideration.

Harris timely filed her Petition for Review on December 3, 2010, and this Court granted the Petition on April 27, 2011.

IV. ARGUMENT

A. The Court of Appeals Erred by Failing to Interpret RCW 4.84.280 According to Its Plain and Ordinary Meaning.

RCW 4.84.280 states:

> Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to ***trial***. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purposes of determining attorney's fees as set forth in RCW 4.84.250.

(Emphasis added).

When ascertaining the meaning of a statute, the court first looks to the language of the statute. Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). "The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). "Courts should assume that the Legislature means exactly what it says." Berger v. Sonneland, 144 Wn.2d 91, 105, 26 P.3d 257 (2001).

"Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. An undefined statutory term should be given its usual and ordinary meaning. Statutory provisions and rules should be harmonized whenever possible." Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). When a term has a well-accepted, ordinary meaning, a regular dictionary may be consulted to ascertain the term's definition. Tingey v. Haisch, 159 Wn.2d 652, 658, 152 P.3d 1020 (2007). When a technical term is used in its technical field, the term should be given its technical meaning by using a "technical rather than a general purpose dictionary to resolve the term's definition." Id.

The Black's Law Dictionary, p. 1504, (Deluxe 6th ed. 1997), defines "trial" as:

> A *judicial examination* and determination of issues between parties to action, whether they be issue of law or fact, *before a court that has jurisdiction.* [Citation omitted]. A *judicial examination*, in accordance with law of the land, or a cause, either civil or criminal, of the issues between the parties, whether of law or fact, *before a court that has proper jurisdiction.*

(Emphasis added). On the other hand, "arbitration" is defined in the Black's Law Dictionary, p. 105, (Deluxe 6th ed. 1997) as:

> A *process of dispute resolution* in which a *neutral third party (arbitrator)* renders a decision after a hearing at which both parties have an opportunity to be heard."

(Emphasis added).

In the case at bar, the Court of Appeals concluded that "mandatory arbitration" was included in the term "trial" under RCW 4.84.280, and thus Harris was not entitled to an award of attorney's fees. However, "trial" and "mandatory arbitration" are not synonymous. "Trial" is a judicial examination before a court that has jurisdiction, whereas "mandatory arbitration" is a dispute resolution process mandated by statute that is before a neutral third party called an arbitrator. *See* Kruger Clinic v. Regence Blueshield, 157 Wn.2d 290, 303, 138 p.3d 936 (2006) (Recognition by this Court that "arbitration" is a form of alternative dispute resolution, similar to mediation, used as an alternative to litigation in court).

By concluding that "mandatory arbitration" was included in the term "trial" as used in RCW 4.84.280, the Court of Appeals failed to give the term "trial" a plain and ordinary meaning and read into the statute language that did not exist. This Court has repeatedly stated that "Courts may not read into a statute meaning that is not there." Burton v. Lehman, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005); State v. Cooper, 156

Wn.2d 475, 480, 128 P.3d 1234 (2006); Dominick v. Christensen, 87 Wn.2d 25, 27, 548 P.2d 541 (1976).

More importantly, an examination of a related statute, RCW 4.84.010(5) and (7), as well as the amendments made to this particular statute also demonstrates that the Legislature did not intend to include "mandatory arbitration" to RCW 4.84.280.

Unlike RCW 4.84.280, the Legislature in RCW 4.84.010(5) and (7) explicitly included the words "trial" and "mandatory arbitration" in the same provisions, allowing a prevailing party to recover the costs of obtaining reports and records as well as deposition transcripts. Subsection (5) of RCW 4.84.010 reads:

> Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at *trial* or in *mandatory arbitration* in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files.

See RCW 4.84.010(5) (Emphasis added). Similarly, subsection (7) of RCW 4.84.010 reads:

> To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at *trial* or at the *mandatory arbitration* hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

See RCW 4.84.010(7) (Emphasis added).

By explicitly using both the words "trial" and "mandatory arbitration" in RCW 4.84.010(5) and (7), the Legislature clearly acknowledged the distinction between a "trial" and "mandatory arbitration," and recognized that the two terms were not synonymous. *See* Simpson Inv. Co. v. Dep't of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (Where "different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word."). More importantly, the explicit addition of the word "mandatory arbitration" to RCW 4.84.010(5) and (7) as part of the "1984 Court Improvement Act" amendments, despite the fact that the former statute already contained the word "trial" in each subsection demonstrates that the Legislature clearly intended these terms to have independent meanings. *See* Laws of 1984, ch. 145, § 92, attached to Petition for Review as Appendix at p. 18. Accordingly, the Legislature intended to have the prevailing party be allowed to recover the expenses of obtaining reports or records as well as deposition transcripts, even if they were used only at the mandatory arbitration. Id.

On the other hand, the Legislature never added the word "mandatory arbitration" to RCW 4.84.280, even though the Legislature

had every opportunity to do so as part of the amendments to "1984 Court Improvement Act." When the Legislature amended RCW 4.84.280 in 1983, it added the language "at least ten days prior to trial." *See* Laws of 1983, ch. 282 § 1, attached to Petition for Review as Appendix at p. A-19. The following year, even though the Legislature recognized that "mandatory arbitration" was wholly distinct from "trial," as evidenced by the amendments to RCW 4.84.010(5) and (7), the Legislature declined to include the word "mandatory arbitration" to RCW 4.84.280. This omission clearly expresses the Legislature's intent that an offer of settlement must be made at least ten days prior to trial, not mandatory arbitration. As this Court has previously stated, "Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted." Cooper, 156 Wn.2d at 480.

The Court of Appeals erred in concluding that the mandatory arbitration in this case was the "trial" for purposes of RCW 4.84.280. It read into the statute language that did not exist and failed to carry out the Legislature's intent by denying Harris her reasonable attorney's fees, even though she satisfied the requirements of RCW 4.84.280 and was the prevailing party pursuant to RCW 4.84.260.

B. The Court of Appeals Decision in Singer v. Etherington, supra., Should Be Overturned to the Extent It Holds That Mandatory Arbitration Proceedings Shall be Treated as the Original Trial and a Trial De Novo in Superior Court Is to be Considered an Appeal Invoking RCW 4.84.290.

In concluding that mandatory arbitration is the "trial" for purposes of applying RCW 4.84.280, the Court of Appeals relied upon Singer v. Etherington, 57 Wn. App. 542, 789 P.2d 108 (1990). Singer involved interpretation of RCW 4.84.290, an attorneys' fee statute for prevailing parties on appeal.

The Singer court held that "a mandatory arbitration proceeding is treated as the original trial when applying RCW 4.84.290," and "[a] trial de novo in superior court is actually an appeal, making RCW 4.84.290 applicable." Id., at 546. In reaching this conclusion, the Singer court failed to give a plain and ordinary meaning to the word "appeal" as it appeared in RCW 4.84.290. A request for a trial de novo in superior court after mandatory arbitration is not an "appeal" as used under RCW 4.84.290. The Singer decision and the Court of Appeals' reliance on Singer directly conflicts with this Court's precedents, requiring that statutes be interpreted according to their plain and ordinary meaning.

The ordinary meaning of "appeal" as used in the Black's Law Dictionary, p. 96, (Deluxe 6th ed. 1997), is "[r]esort to a superior (i.e. appellate) court to review the decision of an inferior (i.e. trial) court or

administrative agency." See Appendix at p. A-14 attached to Petition for Review. Mandatory arbitration is not an "inferior court" or an "administrative agency." It is a process of dispute resolution similar to mediation. *See* Kruger Clinic, 157 Wn.2d at 303.

More importantly, the Singer court's conclusion that after mandatory arbitration, a trial de novo in superior court is an "appeal" renders portions of RCW 4.84.290 meaningless and superfluous. This Court has stated that interpretations of statutes should not render any portions meaningless or superfluous. *See* State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

RCW 4.84.290 reads:

> If the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250: PROVIDED, That if, on appeal, a retrial is ordered, the court ordering the retrial shall designate the prevailing party, if any, for the purpose of applying the provisions of RCW 4.84.250.
>
> In addition, if the prevailing party on appeal would be entitled to attorneys' fees under the provisions of RCW 4.84.250, the court deciding the appeal shall allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys' fees for the appeal.

If the Singer court's conclusion was correct, it would render the language "PROVIDED, That *if, on appeal, a retrial is ordered, the court ordering the retrial shall designate the prevailing party*" meaningless and

superfluous under the context of a trial de novo. To wit, once a trial de novo is requested, the superior court cannot order the parties to re-arbitrate (i.e. re-trial) as described in RCW 4.84.290. (Emphasis added). "Statutory provisions and rules should be harmonized whenever possible." Christensen, 162 Wn.2d at 373.

The mandatory arbitration rule allows any aggrieved party to request a trial de novo in the superior court. MAR 7.1(a). "When a trial de novo is requested ... *the case shall be transferred from the arbitration calendar* in accordance with rule 8.2 in a manner established by local rule." MAR 7.1(b) (Emphasis added). "The trial de novo shall be conducted as though no arbitration proceeding had occurred." MAR 7.2(b)(1). At trial, whether by bench or jury, parties are strictly prohibited from referencing the arbitration award. Id. "The relief sought at a trial de novo shall not be restricted by RCW 7.06, local arbitration rule, or any prior waiver or stipulation made for purposes of arbitration." MAR 7.2(c).

The plain language in the mandatory arbitration rules indicates that when a party requests a trial de novo in superior court, the trial proceeds "as though no arbitration proceeding occurred." Clearly, this is at odds with the Singer court's interpretation of RCW 4.84.290, on which the Court of Appeals relied. A superior court adjudging a trial de novo simply *cannot* order the parties to re-arbitrate.

Furthermore, this Court's decision in Malted Mousse Inc. v. Steinmetz, 150 Wn.2d 518, 528, 79 P.3d 1154 (2003), supports the contention that the superior court cannot order the parties to re-arbitrate from a trial de novo. The Malted Mousse Court made it clear: when a party requests a trial de novo after mandatory arbitration under RCW 7.06, the "trial de novo is 'conducted *as though no arbitration proceeding had occurred.*'" Id. at 528 (quoting MAR 7.2(b)(1) (original emphasis)).

> We believe the trial de novo process is exactly what the rule says it is: a trial conducted as if the parties never proceeded to arbitration. The entire case begins anew. *The arbitral proceeding becomes a nullity, and it is relevant solely for purposes of determining whether a party has failed to improve his or her position, in which case attorney fees are mandated.*"

Id. (Emphasis added).

Even RCW 7.06.070, the mandatory arbitration statute, seems to indicate the superior court cannot order the parties to re-arbitrate once a trial de novo is requested. The statute provides that "[n]o provision of this chapter may be construed to abridge the right to trial by jury."

Yet under the Singer court's interpretation, if the trial de novo was the "appeal" for purposes of RCW 4.84.290, then RCW 4.84.290 would allow the superior court to order the parties to re-arbitrate. Because the superior court on a trial de novo *cannot* order the parties to re-arbitrate, the Singer court's interpretation would render portions of RCW 4.84.290

meaningless and superfluous. Accordingly, this Court should overturn Singer to the extent that it holds "a mandatory arbitration proceeding is treated as the original trial when applying RCW 4.84.290," and "[a] trial de novo in superior court is actually an appeal, making RCW 4.84.290 applicable."

C. Harris Should Have Been Awarded a Multiplier Under the Lodestar Method on Her Cross-Appeal.

The Court of Appeals declined to address Harris's cross-appeal due to its decision that Harris was not entitled to attorneys' fees under RCW 4.84.280. If this Court reverses the Court of Appeals' decision and reinstates the trial court's award of attorney's fees to Harris, this Court should decide Harris's cross-appeal and conclude that the trial court abused its discretion by not awarding Harris a multiplier on her attorney's fees.

The trial court has broad discretion in fixing the amount of attorney fees to be awarded. Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 335, 858 P.2d 1054 (1993). This court reviews the trial court's award of attorney's fees for manifest abuse of that discretion. Public Utilities Dist. 1 of Grays Harbor County v. Crea, 88 Wn. App. 390, 396, 945 P.2d 722 (1997).

Attorneys' fees are calculated by: (1) establishing a "lodestar" fee by multiplying a reasonable hourly rate by the number of hours reasonably expended on theories necessary to establish the elements of a cause of action; and (2) adjusting that lodestar up or down based upon the risk inherent in the contingent nature of success and, in exceptional circumstances, based also on the quality of work performed. Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 334-35, 858 P.2d 1054 (1993) (citing Bowers v. Transamerican Title Ins. Co., 100 Wn.2d 581, 593-99, 675 P.2d 193 (1983)).

Where an attorney has a usual rate for billing clients, that rate will likely be a reasonable rate. Bowers, 100 Wn.2d at 597. In addition to the usual billing rate, the court may consider the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case. *Id.* The reasonable hourly rate should be computed for each attorney, and each attorney's hourly rate may well vary with each type of work involved in the litigation. *Id.*

The party requesting attorney fees must provide the court with reasonable documentation of the work performed so that the calculation can be made. *Id.* This requires documentation informing the court of the number of hours worked, type of work performed, and category of

attorney performing the work. Bowers, 100 Wn.2d at 597. In awarding attorneys fees, the court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. Id. at 596-97.

The second step in the attorney fee award analysis is to consider whether the lodestar should be adjusted to reflect the contingent nature of the recovery and the quality of the work performed. Bowers, 100 Wn.2d at 598. The party proposing a deviation from the underlying lodestar bears the burden of justifying that deviation. Id. It is this second step which is at issue in Harris's cross appeal.

Upward adjustments for the contingency nature of the representation should be considered as attorneys who undertake cases on a contingency basis, bear the risk that they will not be compensated at all for their time and effort if the case is not victorious. Bowers, 100 Wn.2d at 598-99. Due to the substantial risk of a zero return in the event of loss "lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk." Id. at 598 (citing Samuel R. Berger, Court Awarded Attorneys' Fees: What is "Reasonable," 126 U. Pa. L. Rev. 281, 324-25 (1977)). The contingency adjustment is designed to compensate for the possibility that litigation may be unsuccessful and that no fee would be received. *Id.* at 598-99. A

contingency risk multiplier is intended to make it possible for clients with good claims to secure competent legal assistance. *Id.* A court may award a multiplier where such a multiplier would further the purpose behind the multiplier itself. Travis v. Washington Horse Breeders Ass'n, Inc., 111 Wn.2d 396, 411-12, 759 P.2d 418 (1988).

In adjusting the lodestar to account for this risk factor, the trial court must assess the likelihood of success at the outset of the litigation. *Id.* at 598. The Bowers Court acknowledged that "[t]his is necessarily an imprecise calculation and must largely be a matter of the trial court's discretion" but offered the trial court three guiding principles: (1) adjustments to the lodestar should only be made when there is no fee agreement that assures the attorney of fees regardless of the outcome of the case; (2) no adjustment should be made if the hourly rate underlying the lodestar fee comprehends an allowance for the contingent nature of the availability of fees; (3) the risk factor adjustment should only be applied to time where there was risk incurred, that meaning, the time before recovery was assured. Therefore, the time expended in obtaining fees themselves should not be adjusted. *Id.* at 598-99.

As the quality of an attorney's work is reflected in the reasonable hourly rate, adjustments due to quality of work are limited: "A quality adjustment is appropriate only when the representation is unusually good

or bad, taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute the 'lodestar.'" *Id.* (quoting Copeland v. Marshall, 641 F.2d 880, 893 (D.C. Cir. 1980).

Here, the court granted Harris attorney fees. CP 800-01. Harris requested a multiplier in her motion for award of attorney fees. CP 461. The court did not award the multiplier. CP 800-01.

The purpose of the contingency fee adjustment to the lodestar is to compensate for the risk taken by counsel that there would be no, or only a small recovery. Bowers, 100 Wn.2d at 598-99. When an attorney takes a case on a contingency basis, the attorney not only risks obtaining no compensation at all for their time, but also risks having to wait years before receiving any compensation for their time. Unless attorneys handling cases on a contingency basis receive a premium for taking those risks, people with legitimate claims will not be able to find representation. Chuong Van Pham v. City of Seattle, Seattle City Light, 159 Wn.2d 527, 550, 151 P.3d 976 (2007) (fee enhancements are based on the notion that attorneys who take undesirable high-risk case on a contingent fee basis assume a substantial risk that a fee will never materialize). Marketplace experience indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk. Bowers, 100 Wn.2d at 598.

There is ample case law in addition to Bowers to support a multiplier. In Banuelos v. TSA Washington, Inc., 134 Wn. App. 607, 617, 141 P.3d 652 (2006), the court upheld a multiplier of 1.5 noting that it would not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small. *Id.* In Wash. State Phys. Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993), the court awarded a multiplier of 1.5. *Id.* at 335. The court in Somsak v. Criton Technologies/Health Tecna, 113 Wn. App. 84, 98-99, 52 P.3d 43 (2002), awarded a multiplier where there was a "significant risk of defeat" and the case was not desirable. Likewise, the court Durand v. HIMC Corp., 151 Wn. App. 818, 837, 214 P.3d 189 (2009) upheld a multiplier due to the "enormous amount of contingent risk" inherent in the litigation.

Under Bowers, the trial court may consider the following in awarding a multiplier: (1) whether there is a fee agreement that assures the attorney of fees regardless of the outcome of the case; (2) whether the hourly rate underlying the lodestar fee comprehends an allowance for the contingent nature of the availability of fees; (3) the risk factor adjustment should only be applied to time where there was risk incurred, that meaning, the time before recovery was assured. *Id.* at 598-99. Harris has satisfied the *Bowers* factors. *Id.* at 598-99.

There was no fee agreement assuring her attorney of his fees regardless of the outcome of the case. CP 487-91. The hourly fee Kang requested was actually below the reasonable hourly rates he charged for other, non-contingent work and did not allow for the contingent nature of the case. CP 462, 487-91. Finally, Harris sought a multiplier only on the time expended to secure judgment, and not on any post judgment fees.[1] CP 467. A lodestar adjustment would represent the premium afforded under Bowers for taking on the risk of the case and would further the purpose behind the multiplier itself. *Id.* at 598; Travis, 111 Wn.2d at 411-12.

The trial court here recognized the risks involved in handling a minor impact soft tissue injury case where liability and damages were in dispute. FOF 5, 26. It recognized that Kang was requesting only $275 an hour, rather than his ordinary hourly rate of $300. FOF 21. The court specifically found that Harris's case was a difficult one where liability and damages were in dispute. FOF 22. More importantly, there were greater contingent risk because defendant prevailed at the mandatory arbitration. FOF 22. It found that bringing soft tissue injury suits is risky where the

[1] Harris did not request a multiplier for the quality of work performed because Kang's usual hourly fee adequately reflected his reputation and the quality of his work. CP 467. *Bowers*, 100 Wn.2d at 599 (an adjustment to the lodestar for the quality of work is extremely limited in application because in most cases the quality of work will be reflected in the hourly rate).

defense claims no impact to the vehicle and/or no objective evidence of injury. FOF 26. It further acknowledged the risk of the case as no other attorney Harris contacted wanted to represent her for the trial de novo. *Id.* It also found that many lawyers decline to accept such cases or to take the cases to trial. FOF 27. Yet the trial court declined to award a multiplier even though it found there were substantial contingent risks.

The award of attorney fees is discretionary. But if ever a case called for a multiplier, it is this one. Harris's case was extremely risky and her prospects of prevailing in the trial de novo were not propitious. Tilaye had prevailed at arbitration, and Harris's first lawyer declined to represent her beyond the arbitration. Harris then contacted twenty or more attorneys who all declined to represent her before Kang finally agreed to take her case. She suffered soft tissue injuries which, as the court noted, are risky to litigate. Kang accepted her case on a contingency basis, with no guarantee of compensation or success, and requested compensation at a rate below his normal hourly rate. Harris made a formal offer of settlement before trial which Tilaye rejected. Nothing about the case presented itself as desirable, winnable, or remunerative.

Harris supported her request for a multiplier with copies of judgments and findings of fact and conclusions of law from King County Superior Court cases in which plaintiffs were awarded multipliers of 2.0 in

soft tissue cases because of the undesirability of the cases, the fact that they were handled on a contingency basis, and the risk that no fee would be earned. CP 507-8, 518-20.

Harris also submitted declarations from seasoned plaintiff's attorneys attesting to the great risk involved in the present case and opining that a multiplier as high as 2.0 was warranted as reasonable compensation for accepting the risk of taking the case on in the first place. CP 440-444, 446-50. Taken together, the declarations make clear why a multiplier has become such an essential tool in the plaintiff's attorney's tool kit. As Attorney Thomas Bierlein stated in his declaration:

> Most insurance carriers know that most claimants will simply fold and accept low offers rather than face a long and expensive battle. For those who choose to resist, a long drawn out battle is in order with no guarantee of success. This has become the norm in the insurance industry since the mid 90s...This is a classic "zero sum game" where insurance carriers will use scorched earth litigation tactics to defeat litigants unless the court awards a lodestar amount to discourage these practices that are so inimical to the judicial system.

CP 443.

Harris's case is precisely the sort of low reward – high risk case the *Bowers* court had in mind when it described the purpose of the contingency fee adjustment to the lodestar. Where a plaintiff seeks to pursue a small claim against steep odds, the multiplier evens the playing

field and allows attorneys to accept risky cases they would, by the simple imperative of business calculations, be otherwise unable to take.

Given the great uncertainty and risk involved in pursuing Harris's comparatively small claim, the risk of pursuing a soft tissue injury suit where the defense prevailed at arbitration, where the defense claimed no impact to the vehicles, no liability, and no damages, there was substantial risk of receiving no fees whatsoever. The public policy expressed in Bowers of compensating counsel for accepting such risk should have warranted a multiplier. The trial court abused its discretion in not awarding Harris her multiplier. Therefore, this Court should conclude that the trial court abused its discretion and award a multiplier of 2.0 on her legal fees.

D. The Court of Appeals Award of Costs in Favor of Respondent Tilaye Should be Reversed

If this Court reverses the Court of Appeals' decision and reinstates the trial court's award of attorney's fees to Harris, this Court should vacate the appellate court's award of costs to Tilaye as the substantially prevailing party pursuant to RAP 14.2. The appellate court concluded that the attorney's fee issue was the "primary and major issue on appeal," thus Tilaye was the substantially prevailing party, awarding him costs in the amount of $5,557.73. *See Commissioner James Verellen's ruling dated*

October 26, 2010. Harris filed a motion to modify the commissioner's ruling, but the appellate court denied the motion to modify. *See Order Denying Motion to Modify dated January 25, 2011.* Harris now requests that this Court vacate the award of costs to Tilaye.

E. Harris Should Be Awarded Reasonable Attorneys' Fees for the Appeal.

Harris requested reasonable attorneys' fees and costs for the appeals pursuant to RCW 4.84.250, 4.84.290 and RAP 18.1. Should this Court reverse the Court of Appeals' decision and reinstate the trial court's decision, Harris should be awarded her attorney's fees and costs pursuant to statute and the Rules of Appellate Procedure.

V. CONCLUSION

This Court should reverse the decision of the Court of Appeals and reinstate the trial court's decision awarding Harris attorney's fees pursuant to RCW 4.84.280. The Court of Appeals' decision that "mandatory arbitration" was included in the term "trial" under RCW 4.84.280 not only ignored the plain and ordinary meaning of "trial," but it failed to recognize that in 1984, the Legislature *explicitly revised* a related statute to include "mandatory arbitration," where the term "trial" was already present. This illustrates that the Legislature clearly recognized the distinction between

the two proceedings and purposefully omitted "mandatory arbitration" from RCW 4.84.280.

This Court should also overrule Singer v. Etherington, infra. insofar as it conflicts with the plain meaning of RCW 4.84.290 and renders portions of the statute meaningless and superfluous.

This Court should also reverse the trial court's decision declining to award Harris a multiplier on her attorney's fees, even though it found that there was significant amount of contingent risk in Harris's counsel taking on Harris's personal injury case on a contingency basis. This Court should conclude that the trial court abused its discretion by declining to award a multiplier on the attorney's fee.

Finally, the award of costs to Tilaye under RAP 14.2 should be vacated and Harris should be awarded attorney's fees and costs for the appeals pursuant to RCW 4.84.250, 4.84.290, and RAP 18.1.

DATED this 25th day of May, 2011.

Patrick J. Kang, WSBA #30726
Attorneys for Respondent Andrea Harris

DECLARATION OF SERVICE

On said day below, I delivered a true and accurate copy of the Petitioner Harris's Supplemental Brief to the following:

VIA U.S. MAIL

Jason E. Anderson
Law Office of Jason E. Anderson
8015 15th Ave. NW, STE 5
Seattle, WA 98117

VIA ABC MESSENGER

Philip Meade
Merrick Hofsteadt & Lindsey PS
3101 Western Ave., STE 200
Seattle, WA 98121

Original filed by Attachment to Email with:

Washington Supreme Court
Supreme@courts.wa.gov

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: May 25th, 2011 at Bellevue, Washington.

Min Lee

Min Lee